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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENT TO REPLY BRIEF FOR PETITIONER

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May It Please The Court:

On September 30, 1991, the Sixth Circuit held, in *Petkiewytsch v. Immigration and Naturalization Service*, No. 90-3952, that the language of the Holtzman Act and the DPA Act (based upon the Holtzman Act) requires proof that the person to be deported be within the "war criminal" class, that he be one of "the perpetrators of the Holocaust" (Slip Opinion, p. 18), and that Petkiewytsch, who was a guard and who was aware of the prisoners being tortured and executed but who did no wrongful act

himself, was not deportable as a persecutor. The Court judged the act of the defendant, and refused to decide the case on the basis of presence as an armed guard at a place of persecution.

The Sixth Circuit presents the precise conflict between the Circuits at Slip Opinion, p. 15, and decides to follow *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), and not the holdings of the Seventh Circuit with which *Laipenieks* conflicts.

And, the Sixth Circuit studies and presents the legislative history, noting that Representative Holtzman explained her bill as containing "an amendment that limits the language of the bill solely to those persons who engaged in war crimes". Slip Opinion p. 17, 134 Cong. Rec. 31,647. Michael Schmidt has never been claimed to have committed a war crime.

The Board of Immigration Appeals, in *Petkiewytsch*, held exactly as did the Seventh Circuit in this case; its holding is paraphrased at Slip Opinion 7:

> "The Board thus concluded that the petitioner was deportable under the Holtzman Amendment because of his duties as a guard at a camp where persons were persecuted based upon race, religion, national origin or political opinion."

It was that holding that was reversed, and that reversal places the Sixth Circuit in exact conflict with the opinion of the Seventh Circuit in this case.

And, the Government argued there, as they do here (Slip Opinion 12) that *Fedorenko v. United States*, 449 U.S. 490 (1981) demonstrates that "It is enough . . . that the petitioner wore a uniform and carried a loaded weapon and his job was to prevent the escape of those confined and subject to persecution".

It was that exact contention, made successfully to the Seventh Circuit, that was rejected by the Sixth Circuit. The conflict is precise.

We say that the acts and deeds of the individual must be judged. The Government says presence, as a guard, is all the proof it needs. The Circuits disagree, and we now ask a resolution of that conflict.

And *Petkiewytsch* demonstrates from the legislative history that Congress intended to exclude or deport those persons who did some act, and not those persons who were present at a place where an act was done. Petkiewytsch knew of those acts but did not participate. Schmidt, outside a walled prison to which he was forbidden entry, did not know as much as Petkiewytsch.

CONCLUSION

We ask that the Court consider the *Petkiewytsch* case in its consideration of this petition.

Respectfully submitted,

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